Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-77-1727 (So 77-1613)

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Southern Motor Carriers Rate Conference, Inc. (hereinafter referred to as SMCRC), respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 21, 1978.[1]

ORDERS AND OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and appears

[1] SMCRC is an Intervening Petitioner in the case below.

in the Appendix hereto.[2] (Ap. A) The action in the Court of Appeals sought review of a decision and order of the Interstate Commerce Commission (hereinafter referred to as I.C.C.), by which motor common carriers of property are required to cancel tariff provisions limiting the application of joint rates to through routes involving not more than two carriers. The I.C.C. Order at issue would mandate that joint rates apply to three-line hauls at a minimum. The opinion of the Court of Appeals affirmed the I.C.C. order. (Ap. A, 4)

The I.C.C. Order was issued in a proceeding styled Ex Parte No. MC-77 (Sub-No. 1), *Restrictions on Service by Motor Common Carriers (Compliance Reports and Interpretations)*, 119 M.C.C. 691 (1974), modified and affirmed on reconsideration 126 M.C.C. 303 (1977), final Order entered May 31, 1977. (Ap. C and Ap. D)

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 21, 1978. A motion to stay was filed before the Court of Appeals, and by Order of said Court entered April 11, 1978, a stay was granted pending an application for a writ of certiorari to be filed within 30 days of the date of the stay order.

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[2] The decision of the Court of Appeals is the subject of petitions for certiorari as filed by several of the bureaus that were petitioners before the Court of Appeals. A joint petitioner's appendix has been prepared, and references herein are to that joint appendix. The appendix is divided into five sections, designated alphabetically. As used throughout this petition "Ap. A," for example, will refer to the entire section A of the appendix; and "Ap. A, 3," for example, will refer to page 3 of section A of the appendix.

(Ap. B) SMCRC now files its application for a writ of certiorari invoking the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case presents important questions concerning the jurisdiction of the I.C.C. It is the principal contention of petitioner that the I.C.C. Order at issue mandates the creation of through routes and joint rates by motor common carriers of property and that such action is in clear violation of limitations imposed on the I.C.C. by Congress as expressed within the Interstate Commerce Act (49 U.S.C. §§ 1 et seq.). It is petitioner's position that the Court of Appeals seriously erred in affirming the I.C.C. Order; that the basis for such error is a preliminary conclusion that three-line through routes can be found already to exist rather than to be established; and that such conclusion stands in direct conflict with previous decisions of the United States Supreme Court. Petitioner asserts that the specific questions set forth below should be answered in the affirmative, and that therefore the requested writ of certiorari should be issued. The specific questions are:

1. Does the decision of the Court of Appeals, which affirms the I.C.C. jurisdiction to require motor common carriers of property to cancel tariff provisions limiting their through routes to joint hauls by not more than two carriers, directly and necessarily depend on a preliminary conclusion that is in direct conflict with the decision of the United States Supreme Court in *Thompson v. United States*, 343 U.S. 549 (1952)?

2. Does the decision of the Court of Appeals misinterpret sections 204(a)(1) and 216(c) of the Interstate Commerce Act[3] so as to improperly expand the jurisdiction of the I.C.C. to allow the I.C.C. to compel motor common carriers of property to establish through routes?

STATUTORY PROVISIONS[4]

The Interstate Commerce Act (hereinafter referred to as the I.C. Act), United States Code, Title 49:

section 216(c) [49 U.S.C. § 316(c)]
section 216(a) [49 U.S.C. § 316(a)]
section 204(a) [49 U.S.C. § 304(a)]
section 15(3) [49 U.S.C. § 15(3)]

The Code of Federal Regulations, Chapter 49:
49 C.F.R. § 1307.27(k)(1)

STATEMENT OF THE CASE

The genesis of this case can be traced back to April 9, 1969, on which date the I.C.C. instituted a rulemaking proceeding, designated and entitled Ex Parte No. MC-77, *Restrictions on Service by Motor Common Carriers*, by publication of notice in the *Federal Register*. It was the stated purpose of the I.C.C. to investigate the need for the establishment of a rule, and, if found needed, its format, to alleviate difficulties experienced by shippers of less-than-truckload quantities of traffic in obtaining service. The result of this rulemaking proceeding is the regulation at 49 C.F.R. § 1307.27

[3] 49 U.S.C. §§ 304(a)(1) and 316(c).

[4] The full text or appropriate portions of the text of statutes and regulations cited are contained at section E of the appendix (Ap. E).

(k)(1), which prohibits common carriers of property from limiting by tariff provisions the full scope of service their certificates authorize. Initially, a compliance date was established as June 1, 1970. Several motor carrier rate bureaus, including SMCRC, which are involved with the publication of tariffs as agents for their carrier members, petitioned for an extension of the compliance date. The I.C.C. granted the requested extension, postponing the date until September 1, 1970, conditioned upon the bureaus reporting on or before June 1, 1970, what actions they had taken or were instituting to comply with the new regulation. SMCRC filed a compliance report.

Approximately four years after the bureaus filed the requested compliance reports, the I.C.C. issued the decision designated as Ex Parte No. MC-77 (Sub-No. 1), appearing at 119 M.C.C. 691 (1974). Therein, the I.C.C. found certain practices "not to be in conformity with the spirit and letter of our decision." Among the practices specified by the Commission as not in conformity with the regulation at 49 C.F.R. § 1307.27 (k)(1), and the practice at issue herein, are tariff provisions providing that rates do not apply on "shipments involving or requiring a two- or three-line haul (or more than any specific number of lines)." 119 M.C.C. at 704. (Ap. C, 13)

Numerous parties, including SMCRC, filed petitions for reconsideration of the above-referenced decision. In particular, it was argued that the Commission's interpretation of the regulation at 49 C.F.R. § 1307.27(k)(1) was tantamount to a requirement of "open routing" forcing carriers to institute through route arrangements thereby contravening the express language

of section 216(c) of the I.C. Act. In response to the petitions, the I.C.C. reconsidered and modified its prior report, entering a Report and Order on Further Reconsideration, appearing at *Restrictions on Service by Motor Common Carriers*, 126 M.C.C. 303 (1977). (Ap. D) In this second report, the I.C.C. conceded that section 216(c) is permissive, not mandatory, and that the I.C.C. cannot force carriers to enter into through route arrangements. Nonetheless, the I.C.C. concluded that once a carrier voluntarily enters into a through route arrangement, the I.C.C. then gains jurisdiction to prescribe rules and impose limitations. 126 M.C.C. at 317. (Ap. D, 14) In pertinent part the I.C.C. ruled "that motor common carriers of property will be required to modify outstanding tariff restrictions . . . which provide that joint rates do not apply on operations involving more than two carriers, to allow for the participation of at least three carriers in a given movement at through rates." 126 M.C.C. at 326. (Ap. D, 23)

Petitions for reconsideration of this final order were filed; and by an order entered May 31, 1977, the Commission denied said petitions thereby making the proceeding administratively final.

On May 5, 1977, several of the bureaus filed a petition for judicial review in the United States Court of Appeals for the Fourth Circuit. SMCRC, by timely filed petition, became an intervening petitioner to this proceeding. The major contention of SMCRC and other petitioners was that the I.C.C. had exceeded its statutory authority as specified at section 216(c) of the I.C. Act, and in direct contravention therewith was now compelling motor common carriers of property to establish new through routes. Petitioners asserted then,

and continue to maintain, that by requiring motor common carriers of property which currently operate over two-line through routes to establish new three-line through routes, the I.C.C. has contravened its clear jurisdictional limitations just as much as they would by compelling completely unrestricted "open routing."

The I.C.C., on brief before the Court of Appeals, conceded the lack of jurisdiction to compel motor common carriers of property to institute through routes. It went on the argue, however, that three-line through routes could be "constructed" from the fact that carriers maintaining two-line "restrictions," nonetheless, interchange traffic with other carriers situated at either end of its local routes. The I.C.C. gives the example of Carrier B holding authority from Philadelphia to Albany, accepting, on the one hand, interchange traffic from Carrier A operating from Richmond to Philadelphia and, on the other hand, tendering interchange traffic to Carrier C operating from Albany to Boston. It argues that the two-line provisions, which the I.C.C. has ordered to be canceled, are restrictions on an existing, if by "construction," through route from Richmond to Boston. That is, in the I.C.C. example, Carrier B is not being compelled to institute a through route from Richmond to Boston; it is, rather, being compelled to remove a tariff restriction which limits application of joint rates to two of the three legs of an existing through route.

In a decision written by Senior Circuit Judge Bryan and entered on February 21, 1978, the Court of Appeals affirmed the I.C.C. order. Judge Bryan answered petitioners' principal argument by concluding that the Commission (Ap. A, 2):

> . . . has not decreed through routes or joint rates; it has only obeyed the fiat of the Congress that it insist that those established by the carriers be reasonable, as witness the Act in Section 204 (a) (1).

Accordingly, the Court of Appeals accepted the argument that the I.C.C. Order did not require the creation of new through routes but, rather, mandated the removal of a restriction on existing through routes.

Petitioners, including SMCRC, by petition filed March 7, 1978, sought rehearing before the Court of Appeals. Said petition was denied by Order entered March 30, 1978. (Ap. B)

REASONS FOR GRANTING THE WRIT

The issue herein is bounded by two principles, each of which must be first noted. On one side is the principle that the I.C.C. has no jurisdiction to compel motor common carriers of property to establish through routes and joint rates. On the other side is the principle that the I.C.C. does have jurisdiction to prescribe reasonable requirements as concerns existing services and, in particular, as concerns through routes that are already established.

The crux of the matter concerns the definition of a through route. The I.C.C. maintains that a through route can be found to constructively exist where a carrier will accept interchange traffic on one end of its local route or will tender interchange traffic at the other end of its local route. Predicated on this definition of a through route, the I.C.C. terms tariff provisions that limit application of joint rates to two-line hauls to be a restriction on the otherwise existing

through route. It is implicit in the decision of the Court of Appeals that this I.C.C.-forwarded definition of an existing through route was accepted. The first section of the argument, which follows this prefatory section, will be directed at showing that the preliminary conclusion of an existing through route was absolutely necessary to the ultimate conclusion of the Court of Appeals. As this necessary, preliminary conclusion sinks or swims, so must the decision to affirm the I.C.C. Order.

The second section of this argument will show that the I.C.C.-forwarded definition of a through route, and the necessary, preliminary conclusion of the Court of Appeals that a three-line through route already exists, are incorrect. More importantly, in terms of persuading this Honorable Court to grant this petition for certiorari, it will be shown that the utilized definition of a through route stands in absolute conflict with the previous holding of this Court in *Thompson v. United States*, 343 U.S. 549 (1952) as concerns this very same issue. There, it was clearly held that the mere fact that a carrier accepts from, or tenders to, another carrier interchange traffic does not call into existence an actual or constructive through route.

Once it is recognized that the I.C.C.-forwarded definition of a through route is incorrect, it then must be concluded that the assailed tariff provisions cannot properly be termed restrictions but are, rather, statements of the current existence of two-line through routes but not three-line through routes. The I.C.C. Order then does not remove restrictions from existing three-line through routes but, rather, mandates the creation of three-line through routes. The I.C.C. Order,

accordingly, must be considered an unlawful attempt to circumvent the clear parameters of I.C.C. jurisdiction indicated at section 216(c) of the I.C. Act. The third section of this argument will focus on this improper result, which this Court is now requested to rectify.

1. The Acceptance Of the I.C.C.-Forwarded Definition Of a Through Route, and the Conclusion That Three-Line Through Routes Can Be Considered In Constructive Existence, Are Necessary To the Ultimate Decision Of the Court Of Appeals

The I.C.C.'s jurisdiction as concerns through routes and joint rates is expressed in three vastly different manners within the I.C. Act as concerns rail carriers, motor common carriers of passengers, and motor common carriers of property. Section 15(3) of the I.C. Act grants the Commission permissive jurisdiction to establish through routes and joint rates for rail carriers. Section 216(a) of the I.C. Act mandates, unconditionally, that common carriers of passengers establish through routes and joint rates. The mandate at section 216(a) of the I.C. Act is so strong that a passenger carrier has been denied an extension of its authority to points served by connecting carriers, even when it was shown that those carriers had refused to maintain a through route with applicant. The I.C.C. held that section 216(a) of the I.C. Act compelled the connecting carriers to establish those very through routes and to provide adequate service thereover. *Lincoln Trails System, Inc., Common Carrier Application*, 2 M.C.C. 627 (1937). The authority of the I.C.C. to prescribe joint rates for rail carriers, and the duty of motor common carriers of passengers to themselves

establish joint rates, stands in stark contrast with the language of section 216(c) of the I.C. Act. There, it is stated that common carriers of property *may* establish through routes and joint rates. This contrast emphasizes the permissive nature of section 216(c) and, congruently therewith, the Commission's lack of jurisdiction to compel common carriers of property to establish joint rates. *Hausman Steel Co. v. Seaboard Freight Lines, Inc.*, 32 M.C.C. 31, 35 (1942); *Strickroot v. Detroit & C. Nav. Co.*, 253 I.C.C. 535 (1942).

The permissive nature of section 216(c) of the I.C. Act is further evident from consideration of its legislative history. Section 216(a) of the I.C. Act as originally proposed was to apply to all motor common carriers, both passenger carriers and property carriers, and require of them the establishment of joint rates. This was amended by the addition of section 216(c), so that the I.C. Act now requires only passenger carriers to establish joint rates, but permits property carriers to do so. The stated reason for the amendment was that many of the small operators were afraid that by being compelled to establish joint rates, such would give significant preference to the railroads. 79 Cong. Rec. 5655 (1935) (remarks of Senator Wheeler). Whether or not the fears of motor common carriers of property as expressed in 1935 remain appropriate today is unimportant. The fact remains clear that Congress specifically intended for the I.C.C. to have no jurisdiction to mandate the creation of through routes and joint rates for common carriers of property. This operable language has remained unchanged.

It is clear that the I.C.C. has no jurisdiction to compel motor common carriers of property to establish

joint rates. On the other hand, the I.C.C.'s authority to assert jurisdiction to prevent the selective cancellation of joint rates has been upheld, and is not challenged herein. *McLean Trucking Company v. United States*, 346 F. Supp. 349 (M.D. N.C. 1972). In the *McLean* decision, the Court summarized the distinction between joint rates applicable to a through route and a combination of local rates applicable to an interchange of traffic between carriers. This distinction forms one key to the argument petitioner here forwards and should be borne in mind throughout the consideration accorded this petition. It was stated:

> A through rate or joint rate is a combined charge for the entire journey of a shipment of cargo over the lines of several carriers from origin to destination. The cargo originates with one carrier; that carrier issues its bill of lading; and the freight moves under that bill of lading to an interchange where it is transferred to a connecting carrier, which transports the cargo under the same bill of lading to another intermediate carrier or to the ultimate consignee.
>
> Without joint rate agreements, such cargo would have a separate bill of lading for each carrier that handled it; the initiating carrier would have to deliver the cargo to the connecting carrier as the "agent" of the shipper; and each bill of lading would carry its own separate charge for the services of the carrier that issued it. Each carrier in that event would be thought of as a "local" carrier and the freight rates for each separate line would be "local" rates.

> Generally speaking, joint rates for a shipment are cheaper than the sum of the local rates. 346 F. Supp. at 351.

In the *McLean* situation, a carrier had, of its own accord, previously established joint rates, and then sought to cancel those rates by a new tariff publication. The publication of the new tariff would result in the application of the higher local rates to traffic that had previously been handled at the joint rate level. The carrier's action of publishing the new tariff caused an increase in rates. The Court predicated its decision on the language of section 216(g) of the I.C. Act [49 U.S.C. § 316(g)] indicating that a carrier proposing a "change" in a fare shoulders the burden of proof to show that the new rate is just and reasonable. One distinction between the instant situation and that described in *McLean* is immediately clear. In the instant situation, no carrier has come to the I.C.C. proposing to change its rates; and section 216(g) of the I.C. Act is of no application to this situation.

Within the instant decision of the Court of Appeals, the *McLean* decision is cited and it is altogether clear that the same logic is applied, albeit not to apply section 216(g) of the I.C. Act, but to apply section 204(a)(1) of the I.C. Act. The Court of Appeals finds I.C.C. jurisdiction to attach to existing through routes so as to allow the prescription of "reasonable requirements." The through route found to already exist, and accordingly allowing the I.C.C. to escape the limitations of section 216(c) of the I.C. Act, is the constructed through route forwarded on brief by the I.C.C. and which has been outlined above. The key is that by considering the constructive through route as an existing

through route, it can only then be held that the I.C.C. is not ordering the establishment of a through route. At the very core of this controversy is the necessary, if implied, conclusion of the Court of Appeals, that a carrier that accepts or tenders traffic in interchange with other carriers has thereby established, of its own volition, a through route; and that, therefore, the I.C.C. can prescribe reasonable regulations for operations thereover. This preliminary conclusion was essential to the Court of Appeals decision affirming the I.C.C. Order; it is incorrect.

2. The United States Supreme Court Has Previously Held That Through Routes Do Not Exist Merely Because Carriers' Authorities Intersect

It should now be clear that if the preliminary conclusion of the existence of a three-line through route is incorrect, then so, too, must the ultimate conclusion be incorrect. If the through route does not now exist, the I.C.C. then is compelling its creation in clear violation of its jurisdictional limitations. The United States Supreme Court has previously considered the very question of whether a through route exists merely because traffic moves over the line of one carrier to a point of intersection with the line of a second carrier where the traffic is then interchanged for transportation by the second carrier. It was held that more is required before the interchange of traffic occurs over a through route. *Thompson v. United States*, 343 U.S. 549 (1952). The necessary, preliminary conclusions of the Court of Appeals in the instant case stand in absolute conflict with the holding of the Supreme Court in *Thompson*.

In *Thompson*, the Omaha Grain Exchange complained to the I.C.C. that the rate charged by the defendant railroad for shipments of grain from Lenora, Kans. to Omaha, Nebr. were discriminatory as compared to the rates charged for shipments to Kansas City. The defendant railroad operated between Lenora and Omaha via Atchison, Kans. At Concordia, Kans., a point between Lenora and Atchison, defendant railroad's line intersected the line of Railroad B, and Railroad B operated between Concordia and Omaha. The defendant railroad and Railroad B operated a through route and maintained joint rates for traffic moving between Lenora, on the one hand, and, on the other, points between Concordia and Omaha but not Omaha itself.

As has been set forth above, section 15(3) of the I.C. Act grants the I.C.C. the jurisdiction to establish through routes and joint rates for rail carriers. This authority, however, is limited by section 15(4) of the I.C. Act [49 U.S.C. § 15(4)], which provides essentially that the I.C.C. may not compel a rail carrier to establish a through route and joint rate between two points it can serve single-line over a practical route. The limitation imposed by section 15(4) of the I.C. Act, accordingly, barred the I.C.C. from compelling defendant railroad to establish a through route and joint rate between Lenora and Omaha, which joint rate the I.C.C. could otherwise have dictated to be at a level equalized to the Lenora-Kansas City rate. What the I.C.C. did, instead, was exactly what it espoused herein as the rationale for its order compelling three-line joint rates. The I.C.C. constructed a theoretical through route between Lenora and Omaha via Concordia on the basis that defendant railroad and Rail-

road B intersected at Concordia, that each published local rates to and from Concordia, and that defendant railroad and Railroad B presently interchanged traffic at Concordia. Having concluded that a through route already existed, the I.C.C. asserted its authority to consider the reasonableness of the rates over that through route. It found those rates unreasonable and ordered them equalized with defendant railroad's rates between Lenora and Kansas City.

The I.C.C.'s decision in *Thompson* was appealed to a district court, which upheld the I.C.C. decision. Appeal was then brought to the United States Supreme Court. Chief Justice Vinson, delivering an opinion for a unanimous Court, stated the issue accordingly: "The sole question before the Court in this case concerns the content of the term 'through route' as used in the Interstate Commerce Act," 343 U.S. at 550. It was held that a through route is an "arrangement" between connecting carriers for the continuous carriage of goods from the origin point on the line of one carrier to a destination point on the line of another. 343 U.S. at 556. It was further held that the arrangement that brings into existence the through route is to be determind by the incidents and circumstances of the shipment, such as billing, transfer of lading, division of transportation charges, and others. The mere fact that lines connect at a given point, and that each carrier obeys the statutory command of publishing local rates to and from that connecting point, does not alone establish the existence of a through route. The Court pointed out that if the intersection of lines and the publication of rates by each carrier to and from the intersection point alone established a through route, then the power to establish through routes under section 15(3) of the I.C.

Act would be superfluous. Section 15(3) of the I.C. Act presupposes physical connection of the routes. Finally, it was stated: "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation services." 343 U.S. at 557. The United States Supreme Court has subsequently cited this passage as the proper test for the existence of a through route. *Denver & R.G.W.R. Co. v. Union P. R. Co.*, 351 U.S. 321, 327 (1956).

The necessary, preliminary conclusion of the Court of Appeals that the constructed route is an existing through route stands in direct conflict with the United States Supreme Court holding in *Thompson*. If *Thompson* is properly applied to the instant fact situation, it is clear that the carriers that have published two-line provisions as concerns through routes have never held themselves out to operate three-line through routes That is, the two-line provision is not a restriction against a service the carriers otherwise would operate but is, rather, the announcement of just what the carriers are holding out to perform. The Court of Appeals has affirmed an I.C.C. mandate that carriers, who never held themselves out to participate in a three-line through route now hold themselves out to do just that. Inasmuch as it is the holding out of the three-line service that brings the three-line through route into existence, it should be clear that the I.C.C. Order mandates the establishment of a through route.

3. The Court Of Appeals Has Erroneously Permitted the I.C.C. To Expand Its Jurisdiction Beyond the Boundaries Established By Congress

The discussion above should make it clear that section 216(c) of the I.C. Act prohibits the I.C.C. from asserting jurisdiction to compel motor common carriers of property to establish through routes and joint rates. Section 204(a)(1) of the I.C. Act authorizes the I.C.C. to establish reasonable requirements with respect to continuous services, "as provided in this part."[5] The very language of section 204(a)(1), no less than the logic of the I.C. Act as a whole, dictates the conclusion that no portion of the I.C. Act can confer jurisdiction on the I.C.C. to compel motor common carriers of property to establish through routes so long as section 216(c) of the I.C. Act precludes such assertion of jurisdiction. Accordingly, once it is recognized that a carrier holding itself out only to participate in two-line through routes has, by proper definition, no three-line through route in existence, constructively or actually; and it is recognized that Part II of the I.C. Act does not provide for the mandatory creation of three-line through routes; then it becomes obvious that section 204(a)(1) does not provide for regulation of a non-existent service.

The I.C.C. does not possess the jurisdiction to mandate the creation of three-line through routes for motor common carriers of property. It cannot create such jurisdiction for itself. The courts cannot create such jurisdiction for the I.C.C. Only Congress can create such jurisdiction. The Court of Appeals has erred by performing a legislative function.

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[5] "Part" refers to Part II of the I.C. Act, which is that part of the Act applicable to motor carrier transportation. 49 U.S.C. § 301.

CONSLUSION AND PRAYER

For the reasons set forth above, it should be concluded that the United States Court of Appeals for the Fourth Circuit, by affirming the involved Order of the Interstate Commerce Commission, has decided a federal question — the proper definition of an existing through route as that term is used within the Interstate Commerce Act — in a way in conflict with applicable decisions of the United States Supreme Court; and has, by authorizing a significant expansion of the jurisdiction of the Interstate Commerce Commission, usurped functions resting exclusively with Congress, thereby departing from the usual course of judicial proceedings so as to call for the exercise of the United States Supreme Court's power of supervision. A review on writ of certiorari should be granted.

WHEREFORE, Southern Motor Carriers Rate Conference, Inc. so prays.

Respectfully submitted,

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